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OFFICE OF PETITIONS

In re Application of
Georges Baikoff et al
Application No. 09/833,958
Filed: April 12, 2001
Attorney Docket No. 32774 PCT A USA

:DECISION DISMISSING
:PETITION TO RESET TIME
:PERIOD AND DECISION
:GRANTING PETITION UNDER
:37 CFR 1.137(b)

This is in response to the communication filed May 17, 2002, which is being treated as a petition under 37 CFR 1.181 (no fee) requesting that the period for reply to the Notice of June 5, 2001 be reset to start on February 19, 2002. This is also a decision on the alternate petition under 37 CFR 1.137(b) to accept the reply to the Notice of June 5, 2001 as having been unintentionally delayed.

The petition under 37 CFR 1.181 is dismissed.

The petition under 37 CFR 1.137(b) is granted.

No Notice of Abandonment has been mailed in this case. However, this application is abandoned by operation of law for failure to timely reply to the Notice to File Missing Parts of Nonprovisional Application (Notice), mailed June 5, 2001, which set a two month period for filing an executed oath or declaration and a \$130 surcharge fee for its late filing. A response was due on or before August 5, 2001, with extensions of time being available up to and including January 5, 2002. No reply or extensions of time having been received, the date of abandonment of this application is August 5, 2001.

Petitioner requests that the period for reply to the Notice mailed June 5, 2001 be restarted as of the date of receipt of the Notice, i.e., February 19, 2002. In support thereof, petitioner has supplied evidence showing the date of receipt of the USPTO Notice at the correspondence address on February 19, 2002. Petitioner states that the original Notice of

June 5, 2001 was never received until receipt of a copy thereof by facsimile transmission from the USPTO on February 19, 2002.

MPEP 710.06 states, in part:

In the event that correspondence from the Office is received late (A) due to delays in the U.S. Postal Service, or (B) because the mail was delayed in leaving the USPTO (the postmark date is later than the mail date printed on the correspondence), applicants may petition to reset the period for reply. . .”

MPEP 710.06 further states that the period may be reset if the petition is filed within two weeks of the date of receipt of the Office action, a substantial portion of the set reply period had elapsed (e.g., at least 1 month of a 2- or 3-month reply period had elapsed) and the petition includes (1) evidence of the date of receipt of the Office action, and (2) a statement setting forth the date of receipt of the Office action at the correspondence address.

The reason set forth in the petition for requesting that the period for reply be restarted does not fall within the realm of MPEP 710.06. More specifically, the Notice of June 5, 2001 was not received late due to delays in the U.S. Postal Service or delayed in leaving the USPTO. Therefore, it would not be proper in the instant case to reset the period for reply. Accordingly, the petition to reset the period for reply to the Notice of June 5, 2001 is inappropriate here and the petition must be dismissed.

However, in view of petitioner's statement that the Notice of June 5, 2001 was not received (prior to receipt of the copy transmitted via facsimile on February 19, 2002), failure to receive the Notice of June 5, 2001 does fall within the realm of MPEP 711.03(c), under the heading "II. Petition to Withdraw Holding of Abandonment Based on Failure to Receive Office Action." A review of the written record in this case fails to disclose any irregularity in the mailing of the Notice of June 5, 2001, and, in the absence of any irregularity, there is a strong presumption that the Notice was properly mailed to the applicant at the address of record. This presumption may be overcome by a showing that the Notice of June 5, 2001 was not in fact received. More specifically, the showing required to establish nonreceipt of an Office action must include a statement from the practitioner stating that the Office communication was not received by the practitioner and attesting to the fact that a search of the file jacket and docket records indicates that the Office communication was not received. Additionally, a copy of the docket record where the nonreceived Office communication would have been entered had it been received and docketed must be attached to and referenced in practitioner's statement. The petition is not accompanied by

the evidence required by MPEP 711.03(c) to establish nonreceipt. Therefore, as requested, the petition will be treated under the alternative provisions of 37 CFR 1.137(b).

The petition satisfies the requirements of 37 CFR 1.137(b). Accordingly, the reply to the June 5, 2001 Notice is accepted as having been unintentionally delayed.

As authorized, the \$1,280 petition fee will be charged to petitioner's Deposit Account No. 02-4377.

Receipt is acknowledged of the two declarations executed by the inventors herein and the \$130 surcharge fee for their late filing.

Any inquiries concerning this matter may be directed to the undersigned at (703) 305-8680.

This application is being forwarded to the Office of Initial Patent Examination Division for pre-examination processing.

A handwritten signature in cursive script, reading "Frances Hicks".

Frances Hicks
Petitions Examiner
Office of Petitions
Office of the Deputy Commissioner
for Patent Examination Policy